IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

LANS V. LANS

TRISHIA JOANNE LANS, APPELLANT,
V.
DEVIN DEAN LANS, APPELLEE.

Filed September 4, 2012. No. A-12-274.

Appeal from the District Court for Kearney County: STEPHEN R. ILLINGWORTH, Judge. Affirmed.

Larry W. Beucke, of Parker, Grossart, Bahensky, Beucke & Bowman, L.L.P., for appellant.

Natalie G. Nelsen, of Dier, Osborn, Cox & Nelsen, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

SIEVERS, Judge.

Trishia Joanne Lans appeals from orders of the district court for Kearney County overruling her application to remove the parties' minor child from Nebraska, sustaining Devin Dean Lans' counterclaim for primary physical custody of the child, and ordering Trishia to pay child support to Devin in the amount of $349 per month. After our de novo review for abuse of discretion, we affirm.

BACKGROUND

On August 20, 2010, a decree of dissolution was entered awarding the parties joint legal custody of the minor child, Braxtynn Lans, who was born in February 2007, and awarding Trishia primary physical custody. Pursuant to the terms of the parenting plan, Devin was awarded weekend parenting time for two weekends in a row and then Trishia would have the child on the third weekend, subject to her change of employment. When Trishia's employment did change at some point in time--the date is not revealed by the record--Devin began exercising visitation with Braxtynn every other weekend. Devin was also granted visitation 1 day per week,

but he had not taken advantage of that visitation since the parenting plan was adopted. Devin was also granted 1 week of parenting time in the summer. At all times relevant to this appeal, Devin was living in Stamford, Nebraska.

Trishia married Chad Baethge (Chad) on June 29, 2011. She and Chad had a child, who was born in March 2011. At the time the dissolution decree was entered, Trishia was working as a hair stylist in Hastings, Nebraska, though she was living in Minden, Nebraska. At the time of the removal hearing, she was not employed, electing to stay home with her two young children, albeit "at home" in Utah.

On September 6, 2011, Trishia filed an application for permission to remove Braxtynn from Nebraska to Price, Utah. Chad was living in Utah at that time and was employed as an ironworker. Trishia testified that she did not move her possessions to Utah, but she stayed with Chad whenever she was there. Trishia testified that, based on assurances from Devin that they could "try to work out a plan" for the move, she enrolled Braxtynn in preschool in Utah. Trishia testified that thereafter, Devin withdrew his consent to the move. She testified that she then attempted to enroll Braxtynn in preschool in Nebraska, but she was unable to do so because the program was full. Trishia testified that she believed it was important for Braxtynn to attend preschool, so she drove her to Utah to attend preschool there, bringing her back for Devin's visitation every weekend. Trishia testified that she made the trip to Utah four times over the course of 2 months. Trishia testified that the drive to Price was about 12 hours each way.

On September 16, 2011, Devin filed an answer to Trishia's removal petition and a counterclaim to modify custody. Then, on October 20, Devin filed a motion for immediate change of custody. The motion recites that on or about October 1, it came to Devin's attention that Trishia had moved to Utah with Braxtynn, and that doing so without permission of the court was a violation of the "clearly established" Nebraska law. A hearing was held on November 2, at which hearing each party submitted an affidavit. On November 10, the trial court issued an order awarding Devin temporary custody of Braxtynn until the final removal hearing. The order provided that Trishia's actions had effectively removed the minor child from the jurisdiction under the guise of trips to Utah to visit Chad.

A hearing on Trishia's petition for removal was held on December 2, 2011. On March 12, 2012, the court filed its journal entry and order denying Trishia's application for removal and awarding primary physical custody of the child to Devin. The court found that Trishia's desire to keep her new family unit intact was a legitimate reason for the move, but that the move is not in Braxtynn's best interests. In analyzing the child's best interests, the court found that the following factors weighed in favor of denying removal: (1) Trishia's employment would not be enhanced in Utah, because she would be going from being employed in Nebraska to being unemployed in Utah; (2) the strength of Braxtynn's ties to her present community are strong in Nebraska, and she has no extended family in Utah; and (3) there is evidence that Trishia has frustrated Devin's visitation and that a distance of 750 miles between Devin's home in Nebraska and Trishia's home in Utah could further exacerbate that situation. In addition to the usual factors analyzed by a court in a removal case such as this one, the court here identified another factor that it took into consideration. That factor was that Trishia's new husband, Chad, was an ironworker whose employment history shows several moves across the United States since 2004. The order recites in this regard:

> In 2004 [Chad] resided in Louisiana, 2005 Alabama, 2006 Texas, Virginia in 2009 and Nebraska in 2009-2010. Although [Chad] testified that he thought he could have employment opportunities in Utah for two to three years it is clear from his employment history that he will move around on a regular basis. The Court is of the opinion it is not in the child's best interests to move around as frequently as the mother's new husband has in the past. Compare that situation with the stability of the child living in Nebraska where she has an abundance of extended family with stability.

The court concluded that there had been a material change in circumstances based on Trishia's move to Utah and that permanent custody should be placed with Devin. The order notes Trishia's testimony that if removal to Utah were denied, she would move back to Minden to retain physical custody. The court found:

> Logically and on a plain and common sense basis the Court finds it is quite unlikely that she would be willing to leave her new husband and baby to participate in a marriage from a distance of seven hundred fifty miles. The more likely scenario is that she would remain in Utah and travel to Stamford and deliver the child for visitation.

Thus, we consider the above finding, when coupled with the award of permanent physical custody to Devin, to be a denial of Trishia's request that she have physical custody of the child if she returns to Nebraska. The court also terminated Devin's child support effective November 1, 2011. It found that the current child support calculation was insufficient and ordered the parties to "submit new calculations taking into account [Trishia's] new child and health insurance." A parenting plan is attached to the order outlining the parties' respective visitation time with Braxtynn.

On April 2, 2012, an order was entered recalculating the parties' child support. The order states that although Trishia is currently unemployed, such unemployment is voluntary. The order provides that pursuant to the Child Support Guidelines Rule 4-204, the court may consider the parties' earning capacity in lieu of actual income. Accordingly, the court found that Trishia has a gross monthly earning capacity of $1,560 per month and that Devin has a gross monthly earning capacity of $1,765 per month. The court ordered Trishia to pay child support in the amount of $349 per month effective April 1. Trishia was ordered to receive a 50-percent reduction in child support for each 28 days of summer visitation she exercises.

ASSIGNMENTS OF ERROR

Trishia alleges that the trial court abused its discretion by (1) finding that there was a material change in circumstances warranting a modification of custody, (2) failing to order a parenting plan based on the evidence presented, and (3) failing to assess childcare costs.

STANDARD OF REVIEW

Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Vogel v. Vogel*, *supra*.

ANALYSIS

Was Material Change in Circumstances Proved?

Trishia first alleges that the trial court abused its discretion by finding that there was a material change in circumstances warranting a modification of custody. She claims that she has been "reprimanded and punished for 'moving' to Utah and enrolling Braxtynn in the Head Start [preschool] program there." Brief for appellant at 18-19. She asserts that "[a]lthough it is questionable whether that warranted a temporary custody move, it certainly does not warrant a permanent change in custody." Brief for appellant at 19. Further, she asserts that because she intends to stay in Nebraska if removal is denied, that effectively takes away any complaint of a change in circumstances relating to Utah, "leav[ing] little else to [Devin's] counterclaim." Brief for appellant at 19.

Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). A material change in circumstances, for the purpose of a child custody modification proceeding, means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.* In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. *Id.*

What is different now than at the time of the dissolution is that Trishia has remarried; that she has a baby with her new husband, Chad; and that Chad leads what could be called a somewhat "nomadic" life as he moves from state to state for his job as an ironworker. Accordingly, the evidence is rather compelling that Utah is not going to be a permanent residence for Trishia and Chad. Moreover, Trishia removed Braxtynn from Nebraska without court permission, and the court found that she attempted to disguise what was effectively a removal of Braxtynn as mere visits to Chad in Utah. As the trial court pointed out, Chad has a history of multiple moves to different states for his employment as an ironworker and there is no indication he will cease moving from state to state as work in his field becomes available. Since 2004, he has resided in Louisiana, Alabama, Texas, Virginia, Nebraska, and now Utah. We have little hesitancy in concluding that had the trial court known at the time of the dissolution that Trishia was going to be in a relationship requiring periodic moves to another state every year or two, that instead of joint custody, the court would have awarded Braxtynn's primary custody to Devin, remembering that the parties agreed that the other is a fit and proper parent.

While Trishia does not make any assignment of error concerning the court's finding that residing with Devin is in Braxtynn's best interests, we nonetheless touch on the evidence in this regard under the rubric of the well-known factors consistently utilized since the Supreme Court's decision in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Braxtynn has absolutely no extended family in Utah, whereas the child's maternal and paternal extended family lives in Nebraska, all of whom Braxtynn has a close familial bond with, according to the evidence. Braxtynn's maternal grandmother and great-grandmother live within an hour of Devin, as do Devin's parents. There was no evidence that the child's living conditions or education and

environment would be enhanced or improved by the move. And, there was no evidence that this proposed move would enhance Trishia's employment--she was employed in Minden, but she does not intend to work in Utah. As the court in *Farnsworth* noted, where the ties between the child and the noncustodial parent and extended family or the community are so substantial as to make a long-distance move undesirable, it is appropriate for the court to consider transferring custody.

Weighing all of these factors in the context of our de novo review as we are required to do, we cannot say that the trial court abused its discretion in finding that there was a material change of circumstances warranting a change of permanent physical custody of Braxtynn from Trishia to Devin and that such a change is in Braxtynn's best interests. This assignment of error is without merit.

Was Trial Court's Parenting Plan
Abuse of Discretion?

Trishia's next allegation is that the trial court abused its discretion by failing to order a parenting plan based on the evidence presented at trial. She claims that the plan ordered by the trial court assumes that Trishia had moved to Utah and that she would remain in Utah in the event removal was denied. The simple reality is that Trishia's new husband, Chad, and their baby are in Utah, and common sense dictates that is where she will be also. More important, the trial judge, who had the benefit of hearing and observing the witnesses, concluded that Trishia will end up residing with Chad and their baby in Utah and bringing Braxtynn back to Nebraska for visitation--a 12-hour drive each way--rather than actually living in Nebraska. We cannot say that conclusion is clearly wrong. Thus, the trial court did not abuse its discretion in concluding that Trishia had in fact moved to Utah. In the event she actually takes up residence in Nebraska again, she can seek modification of the court's order made in this proceeding. She requests that the previous parenting plan be restored if we award her custody, which we do not do, and she requests that a plan similar to the original parenting plan be implemented in the event we affirm custody with Devin. The latter request to return to the earlier parenting schedule does not take into account the considerable distance between where the parties now reside, and thus, it is simply not realistic. We have closely reviewed the 7-page parenting plan that the court adopted and ordered as part of its decision. While we do not recite its details, we find that it is an appropriate plan given that it maintains joint legal custody but makes the "principle residence of the child" with Devin.

In conclusion, we agree with Devin that based upon the evidence that Trishia had essentially resided in Utah with Chad following the filing of her removal application, combined with the evidence that Chad will continue to live in Utah (or some other state), it was not an abuse of discretion for the trial court to enter a parenting plan based on Trishia's living in Utah. We reject this assignment of error.

Did Trial Court Err in Failing
to Award Childcare Costs?

In light of our previous finding that the trial court did not abuse its discretion in modifying the decree and transferring primary physical custody to Devin, we find no merit to Trishia's argument that the court erroneously failed to make provision for childcare costs in its

modified parenting plan. If anything, this would be an issue that is perhaps Devin's to raise, because he is the parent who will have primary physical care of Braxtynn and thereby bear the brunt of the costs of daycare. However, Devin has not cross-appealed this issue, and therefore, we do not disturb the trial court's decree in this or any other regard.

CONCLUSION

For the foregoing reasons, we affirm the orders of the district court for Kearney County in all respects.

AFFIRMED.